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# Supreme Court of the United States

October Term, 1943.

No. 389

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WAYNE M. NEAL, THE LOUISVILLE DRYING  
MACHINERY COMPANY and CITRUS PAT-  
ENTS COMPANY, - - - - - Petitioners,

*versus*

STATE OF FLORIDA, THE STATE BOARD OF  
EDUCATION OF FLORIDA; and STATE  
BOARD OF CONTROL.

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## PETITION FOR REHEARING.

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HUGH AKERMAN,  
*Counsel for Petitioners.*

ARTHUR F. ROBERT,  
*Of Counsel for Petitioners.*



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## PETITION FOR REHEARING.

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*To the Honorable, the Chief Justice and the Associate Jus-  
tices of the Supreme Court of the United States:*

This court entered an order on November 8, 1943, sum-  
marily denying defendants' petition for writ of certiorari  
to the Supreme Court of Florida, filed September 27, 1943.

## GROUND.

Defendants now bring this petition for rehearing and  
respectfully request this court particularly to reconsider  
questions (a) and (f), raised in the petition for certiorari  
by the first and last assignments of error, on the following  
grounds:

1. That each and every conceivable ground, including Project 239 and Neal's activities under that Project, upon which the Florida Supreme Court based Neal's specific contract of employment, was entirely and exclusively federally based; and

2. That the same fundamental due process violation condemned by this court in *Saunders v. Shaw*, 244 U. S. 317, 61 L. E. 1163, 37 S. C. 638, is involved in this case.

### **ARGUMENT.**

#### **Summary.**

1. The Florida Supreme Court, in concluding that Neal's employment contract became specific when Project 239 was set up under the Purnell Act and Neal placed in charge, based that specific contract exclusively on federal grounds because:

- (a) the Purnell Act is a federal Act;
- (b) Neal was a Purnell employee whose entire activities had to be and were strictly based on, and strictly confined within the scope of, the Purnell Act; and
- (c) Project 239 was a Purnell project which had to be and was strictly based on, and strictly confined within the scope of, the Purnell Act.

2. The court intended to base Neal's specific employment contract exclusively on federal grounds because:

- (a) a federal basis gives meaning to all statements made by the court in its opinion; and
- (b) a non-federal basis vitiates the meaning of many such statements.

3. Defendants may assert, as a right under the Purnell Act, their right to be unmolested by an unwarranted and erroneous interpretation and application of the Purnell Act.

4. Neal's specific federally-based employment contract was not an issue during trial because the pleadings did not allege that Neal was a Purnell employee, that Project 239 was a Purnell project, and that Neal was assigned to a Purnell project.

5. In the absence of evidence by plaintiff respecting notice or knowledge by the corporate defendants of Neal's specific federally-based employment contract, *Saunders v. Shaw, supra*, is authority for holding *first* that the corporate defendants were under no duty to introduce evidence affirmatively establishing their lack of notice or knowledge and *second* that the defendant corporations had no opportunity, no occasion, and no right to introduce such evidence during trial.

6. If defendant corporations lost title to the Neal application because they had notice of the Purnell Act itself, a federal question is raised which should be determined.

7. On the other hand, if the corporate defendants lost title to the Neal application because of the court's holding that they had actual notice of the federally-based employment contract aside from the Act itself, then that holding, being unsupported by evidence, and outside of the issues of the case, on the authority of *Saunders v. Shaw, supra*, violates the right of the defendant corporations to a hearing under the due process clause of the Fourteenth Amendment of the Federal Constitution.



### **First Assignment of Error.**

For convenience we set forth the question raised by this assignment as follows:

- (a) Where an Experiment Station employee, while employed under a general contract, is assigned to a generally worded Purnell project conducted by the Experiment Station under the Purnell Act, does the general employment contract become, at the time of the Purnell project assignment, by virtue of the language of the Purnell Act itself, an express or specific employment contract binding the employee to assign all Purnell inventions, *i. e.*, inventions which relate to the project and which are made by him while working on the project?

The Florida Supreme Court concluded that Neal became specifically employed when Project 239 was set up under the Purnell Act and Neal placed in charge. The conclusion obviously is based on one or more of the following items:

1. Project 239;
2. the Purnell Act; and
3. Neal's assignment to the Project.

The Court's intention to base its conclusion on one or more of the three items mentioned is further evidenced by a number of specific references to (1) the project, (2) the Act and (3) Neal's activities under the project, which references are cited by the Court as supporting its conclusion. *If Project 239 and Neal's activities under it are both federally based, then, since the Purnell Act is a federal act, the court's conclusion is entirely federally based. If the court's conclusion is entirely federally based, then it follows that Neal's specific employment contract is federally*

**based.** Accordingly, it may be said that question (a) above is raised if Project 239 and Neal's activities under it are federally based.

We assert that Project 239 and Neal's activities under it are federally based. To demonstrate the soundness of our assertion, we call attention to a letter (Neal's Exhibit 12) written in January, 1940, by the Experiment Station Director (R. 96) to Dr. Neal's superior, Dr. Shealy, and we quote from it as follows:

"Dr. Neal's salary is paid exclusively from the Purnell Fund, a fund appropriated by Congress and administered by the Secretary of Agriculture, through the Office of Experiment Stations of the United States Department of Agriculture. Congress has charged the Secretary of Agriculture with making and enforcing rules and regulations insuring that the Purnell Fund be used for the purposes specified in the Act of Congress itself. The sole and exclusive purpose of the Purnell Fund is to finance research of a scientific character under projects approved by the Office of Experiment Stations.

"The Secretary of Agriculture has long since ruled very definitely that no employee drawing his entire salary from a Federal Fund or funds can engage in teaching work. This rule is very strictly enforced by the Office of Experiment Stations, and strict compliance with it is one of the conditions under which the Florida Experiment Station has the benefit of Purnell Fund research expenditures at this Experiment Station.

"Congress did not intend or provide that any expenses of resident instruction to students should be defrayed directly or indirectly from the Purnell Fund.

"There is no contribution towards Dr. Neal's salary either from University of Florida teaching funds or from State funds appropriated to or available to the Experiment Station."

This quotation and the record (R. 96, 149, 248-49) make abundantly clear that Neal was a Purnell employee drawing his entire salary during his entire term of employment from the Purnell fund and that, *as a Purnell employee, all of Neal's activities not only had to be but were strictly confined within the scope of and thus based on the Purnell Act to insure "that the Purnell fund be used for the purposes specified in the Act of Congress itself."* **Neal's activities are thus federally based.**

Project 239 was a Purnell project. It was approved by the Office of Experiment Stations of the United States Department of Agriculture in Washington (R. 133-134). The foregoing quotation makes abundantly clear that *Purnell projects had to be and were strictly confined to the scope of and thus based on the Purnell Act to insure "that the Purnell fund be used for the purposes specified in the Act of Congress itself."* **Purnell Project 239 is thus federally based.**

That the court intended to base Neal's specific employment contract exclusively on federally-based grounds is further indicated by the fact that *only a federal basis gives meaning to all of the statements made by the court in its opinion, while a non-federal basis vitiates the meaning of many of such statements.* For example, the court quotes language from Section 1 of the Act as supporting its conclusion respecting the change in Neal's employment from general employment to specific employment. *How could that language support a specific contract based on grounds independent of the Act, such as non-federal grounds?* Again, the court finds that the payment of patent expenses from the Purnell fund is conclusive evidence of the specific contract. *Now how could that be, if the specific contract were based on grounds independent of the Purnell Act, such as non-federal grounds?* A non-federal basis completely vitiates the meaning of the court's holding that

notice of the Purnell Act is notice of the contract. *How could notice of a federal Act be notice of a contract based on non-federal grounds?*

In concluding this point, we reassert: **first**, that the Florida Supreme Court intended to and did base Neal's specific contract squarely and exclusively on the Purnell Act; **second**, that, in doing so, it erroneously interpreted or gave unwarranted effect to that Act since the Act makes no provision whatsoever for inventions; and **third**, that, as a result of this error, defendants' rights were violated, the defendant, Neal, losing his right to sell the Neal application, the defendant, Citrus Patents Company, losing its right to buy, and its title in, the Neal application, and the defendant, Louisville Drying Machinery Company, losing whatever rights the Florida courts seemed to think it has in the Neal application. *While the Purnell Act does not give the defendants any personal or affirmative rights, which can be enforced by a direct suit, they, nevertheless, may assert, as a right under the Purnell Act, their right to be unmolested by an unwarranted and erroneous interpretation and application of the Purnell Act.* Nutt v. Knut, 200 U. S. 13, 50 L. E. 348, 26 S. C. 216.

### Sixth Assignment of Error.

For convenience the question raised by this assignment is repeated as follows:

- (f) Where a final judgment of the highest court of a state has the effect of depriving a defendant of property by holding that such defendant had notice of a **federally-based employment contract**, i. e., one based on and arising under the Purnell Act of Congress, does that holding constitute a deprivation of property without due process of law because that defendant had not the opportunity or the occasion for a hearing on the notice issue, on which the holding was based, since such issue:

first, was not joined in the pleadings during the trial; second, was before the highest court only on an appeal from the denial of plaintiff's motion, made at the conclusion of the trial, to amend the pleadings to conform to the evidence; and, third, was totally unsupported by any evidence whatsoever in the case?

In *Saunders v. Shaw*, 244 U. S. 317, 61 L. E. 1163, 37 S. C. 638, this court held that where, during trial, the trial court rules out some phase of plaintiff's testimony as not being admissible, the defendant is under no duty to rebut such testimony, even though the plaintiff succeeds in spreading it upon the record; hence if, upon plaintiff's appeal, the Appellate Court gave plaintiff a judgment based on such testimony, it violates defendants' rights under the due process clause of the Fourteenth Amendment.

We submit that the present case involves the same fundamental violation of the due process clause. As a basis for our demonstration of this fact, we outline the pertinent allegations (R. 2-3) of the complaint and the responsive pleadings (R. 15-16, 21-22) of both corporate defendants as follows:

<i>Complaint Article III alleges:</i>	<i>Corporation Answers Item 3 respond:</i>
1. Neal employed "prior to 1935" as member of Experiment Station Research Staff.	1. Admitted.
2. Neal assigned to Official Project 239 (not plead as a Project under Purnell Act).	2. No knowledge.
3. While working on project Neal becomes interested in eliminating moisture from citrus waste.	3. No knowledge.
4. Neal discloses his invention to Experiment Station Director in 1935.	4. No knowledge.
5. Neal enters 1935 oral agreement with Experiment Station.	5. Denied.

The foregoing outline makes clear that the pleadings afforded no basis during the trial for proving that Neal's general employment contract, created in 1929, became a specific federally-based employment contract in 1933 because the pleadings did not allege: that Neal was a Purnell employee; that Project 239 was a Purnell project under the Purnell Act; and that Neal was assigned to a Purnell project. **Thus, the 1933 specific federally-based employment contract was not an issue<sup>1</sup> during trial.**

Defendant corporations assert, as a matter of fact, that there is a **complete absence of evidence<sup>1</sup>** showing that they had knowledge or notice: (a) of any specific employment contract under the Purnell Act or otherwise; or (b) of Project 239 either as a general project of the Experiment Station or as a Purnell project thereof; or (c) of Neal's employment on that project; or (d) of Neal's making the invention while working on that project; or (e) of the conduct, specified by the Florida Supreme Court, of the contracting parties under that project. **Thus, at the end of the trial, there was no evidence showing or even suggesting that defendant corporations had knowledge or notice of the 1933 specific federally-based employment contract.** Under these circumstances, *Saunders v. Shaw, supra* is authority for holding that corporate defendants during trial were under **no duty** to introduce evidence affirmatively establishing their lack of notice or knowledge. It is also authority for saying that the defendant corporation had **no opportunity, no occasion, and no right** to introduce such evidence during trial. Defendants' position was sustained by the trial judge who refused to allow plaintiff's motion, made at the end of trial, to amend the pleadings so that

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<sup>1</sup>The lack of issue or evidence is attested by pages 11-14 of "Respondents' Brief Opposing Writ of Certiorari."

Article III of the complaint would additionally allege some specific employment contract unidentified other than as a contract to invent.

The Florida Supreme Court held that the corporate defendants took title to the Neal application subject to plaintiff's rights therein because the corporate defendants had notice either of the Purnell Act or of the 1933 specific federally-based employment contract. *If this holding means that the corporate defendants lose title to the Neal application because they had notice of the Purnell Act, a federal question is raised which should be determined.* On the other hand, if it means that they had actual notice of the federally-based employment contract aside from the Act itself, then it is a holding completely unsupported by any evidence whatsoever, a holding based outside of the issues of the case and, on the authority of *Saunders v. Shaw*, *supra*, a holding which violently sweeps aside the rights of the defendant corporation to a hearing under the due process clause of the Fourteenth Amendment of the Federal Constitution.

Furthermore, since the 1933 specific employment contract was federally based, then the Florida Supreme Court's holding on notice of that federally-based employment contract does not bind this court because there is a complete absence of evidence to support it. *Postal Telegraph Cable Company v. City of Newport, Kentucky*, 247 U. S. 464, 62 L. E. 1215, 38 S. C. 566.

Defendant corporations assert that if this Court **should find** that the Florida Supreme Court was justified in holding that Neal was bound by a specific employment contract, then this court **should also find** that the Florida Supreme Court should have **either dismissed** the case as to the corporate defendants because of plaintiff's failure to prove notice, **or, remanded** it for further proceedings to give the

corporate defendants an opportunity to present evidence on the notice issue in question. The only alternative, which does **not require proof of notice**, is for this court to find that the employment contract was based by the Florida Supreme Court on the Purnell Act so that notice of the Act was notice of any contract under it, and if it were so based by the Florida Supreme Court, certainly a substantial federal question is raised which this court should determine.

### **Other Assignments of Error.**

In the interests of brevity, we do not argue the other assignments here but, for our position as to them, rely on our original petition and brief.

### **CONCLUSION.**

For the foregoing reasons, it is respectfully submitted that the Order of November 8, 1943, denying defendants' petition for writ of certiorari should be revoked, this petition allowed, and the judgment of the Supreme Court of Florida reviewed and reversed.

Respectfully submitted,

By HUGH AKERMAN,  
*As Counsel for Petitioners.*

ARTHUR F. ROBERT,  
*Of Counsel for Petitioners.*